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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1935.

No. 34

Borax Consolidated, Limited, a corporation, and Pacific Coast Borax Company, a corporation,

Petitioners,

vs.

The City of Los Angeles, a municipal corporation,

Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

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Preliminary Observations.

In petitioners' Opening Brief we endeavored to anticipate the familiar arguments of respondent; but the exigencies of the situation have driven counsel for the City to a change of position on certain cardinal facts and have likewise caused them to evolve, in this court and for the first time, certain new theories of applicable law. To these matters we now address ourselves, without attention

to the issues which are adequately covered in the Opening Brief and not affected by respondent's change of position. For instance, there are many flat assertions of fact made in Respondent's Brief which are directly opposed to those of the Opening Brief; but as the latter are adequately supported by pertinent record references and the former draw their strength from vigor of assertion rather than careful attention to the record, it would not aid this court for us to again traverse the ground; and we therefore forbear.

Respondent's Position Concerning Jurisdiction of Land Department and Conclusiveness of Its Action.

Attempt to Distinguish Petitioners' Authorities.

Counsel's arguments on this head (Resp. Br., pp. 28-56) revolve, as we predicted, around the assumption that *allegation** of tideland status is *proof* of the fact.

It is true that petitioners' authorities do not involve "the question of the jurisdiction of the Land Department to establish a *fixed and permanent* boundary line between tideland and upland" (Resp. Br., p. 28) or "involve the question of the jurisdiction of that department to make a *conveyance of tideland* which is owned and held by a sovereign state" (Resp. Br., p. 28): but it is also true that none of these things has ever been claimed by petitioners (we understand the words "fixed and permanent" to be used in the sense of being impervious to the doctrine

* All italics ours.

of accretion and reliction). Respondent, as later shown, has shifted its position upon the first proposition (now resting heavily upon the "natural boundary" argument); and, on the second, the argument, while it "seems to put us forward in a straight line, in reality it simply carries us back in a circle, like bewildered travelers lost in a wood to the point" where we started.

This attempted distinction of petitioners' authorities does not go to the heart of the matter; they involved jurisdiction of the Department to make an initial survey and the conclusiveness of the same,—not the *permanency* of the boundary thus fixed or the jurisdiction to include within the survey or to convey *known or conceded* tideland. Notable in this respect are the *Knight* case (O. B., p. 47; *Cragin v. Powell* (O. B., p. 37); *People v. San Francisco* (O. B., p. 64); *Russell v. Maxwell Land Grant Co.* (O. B., p. 43) and *United States v. Coronado Beach Co.* (O. B., p. 74).

Respondent's argument is the same as that of plaintiff in the *Knight* case, particularly 5th (d):

> "(d) The decree confirms to the city only the land above or within the ordinary high-water mark at the date of the conquest.
>
> "The premises are outside that specific boundary and, as the surveyor general had no authority under the acts of Congress to survey, nor the Land Office to patent, land not confirmed to the claimant, the decree controls, and the patent is void to the extent that it departs from the specific boundary given in the decree * * *." (142 U. S., p. 167.)

See also 142 U. S. pages 165-7; 172-5.

Misconstruction of Knight Case.

Counsel's assertion (Br., p. 30) that "the only question involved in the *Knight* case was whether a Mexican grant confirmed by the United States would or would not include lands below high water mark" ignores the whole point to the case, in an endeavor to focus attention upon a secondary argument; discussion of which was actually dictum (see O. B., pp. 60, 64-65). The opinion of Judge Wilbur [R. 720] concedes the primary question to have been the conclusiveness of the tideland survey; he stressed the circumstance of a confirmed Mexican grant as the occasion for the survey, the express statutory authority which he conceived to be essential.

The quotation from *Shively v. Bowlby*, 152 U. S. 1, found at Respondent's Brief page 33, is a portion of a discussion of the proposition that "Notwithstanding the dicta contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true." The reference to the *Knight* case was intended to be illustrative of this proposition, but it is an inevitable conclusion from a study of that case that Mr. Justice Gray inadvertently misconstrued the decision. As a matter of fact, it did not decide that lands below high water mark were included in the Mexican grant; it held that, as the decree confirmed title to high water mark and the survey was made by the Department having exclusive jurisdiction, that approved survey was a conclusive determination of the fact that no lands below high water mark were included (see especially quotations at pp. 49, 60, O. B. herein).

Effect of Pollard's Lessee v. Hagan and Similar Cases.

Respondent's contentions that (1) "Conceding that the Land Department has jurisdiction to survey public land, however, it has no jurisdiction to extend such surveys beyond the limit of high water" (Resp. Br., p. 37); (2) "Congress has never authorized the Land Department to dispose of tidelands or to extend its survey and grants beyond the limit of high water" (Resp. Br., p. 39); (3) "The Land Department has no jurisdiction over lands which are not public lands of the United States" (Resp. Br., p. 41), and (4) "The Land Department of the Federal Government had no jurisdiction to patent, grant or transfer title to the land involved in this action" (Resp. Br., p. 43) reflect, in each instance, the circular form of argument so effectively condemned by Mr. Justice Field (see O. B., pp. 33-35). Petitioners have conceded throughout that the jurisdiction of the Land Department extends only to public lands; that its jurisdiction to make surveys is confined to uplands; that any *known or conceded* tideland is beyond its reach; but these concessions do not affect the crucial question at bar, namely, who shall determine where the line between tideland and upland lies and in what manner shall it be determined. The *Knight Cragin* and *San Francisco* cases uphold us in our contention that this matter falls peculiarly within the province of the Land Department.

The inappositeness of *Pollard's Lessee v. Hagan*, 3 How. 212; *Goodtitle v. Kibbe*, 9 How. 421, and similar authorities, has manifestly escaped respondent, as shown by the arguments at pages 43-48. Those cases did not deal with the conclusiveness of Land Department surveys or patents issued pursuant thereto. They involved direct

grants of Congress, predicated upon no surveys of the Department and dependent for effectiveness upon a factual location of the ordinary high water mark. They struggled with the question of what is the boundary and not how shall it be located. They presented the form of judicial question described in the *Russell* case (see O. B., p. 45).

There is no question but what an attempt of the Land Department to convey *known* or *conceded* tideland would be void and that a patent is not conclusive unless the Department has jurisdiction to issue it; it is likewise manifest that an appeal within the Department is not the exclusive remedy where the Department acts without jurisdiction or in excess of jurisdiction. But none of this impinges upon the doctrine that the Department does have jurisdiction to survey public lands (to which category Mormon Island concededly belongs), and that once the subject matter has come within the jurisdiction of a particular tribunal, whether court or executive or other administrative agency, error committed in its exercise does not effect an ouster or offer any proof of original absence of jurisdiction.

What Factual Matters May Be Removed From Judicial Inquiry.

That this principle has full application to the Land Department is pointed out in respondent's case of *Crowell v. Benson,* 285 U. S. 22. The court was there considering the constitutionality of the Longshoremen's and Harbor Workers' Act and the delegation to a Deputy Compensation Commissioner of power to determine issues of fact. It drew a clear distinction between public and pri-

vate rights in the matter of withdrawing factual determinations from judicial inquiry and placing them within the jurisdiction of an executive tribunal, and pointed to the Land Department and its activities as an illustration of the former class, the public rights. The question involved in the case at bar is obviously one relating to public right, the determination of the boundary of public domain, there being no private titles involved at the time of determination, and the state having taken its tideland title subject to the exercise of this paramount Federal power,—its title being, in effect, in abeyance until the exercise thereof. At page 50, the court said in the *Crowell* case:

> "As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. The Court referred to this distinction in Den *ex. dem.* Murray v. Hoboken Land & Improv. Co., 18 How. 272, 15 L. ed. 372, *supra*, pointing out that 'there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.' Thus the Congress, in exercising the powers confided to it, may establish 'legislative' courts (as distinguished from 'constitutional courts in which the judicial power conferred by the Constitution can be deposited') which are to form part of the government of territories or of the District of Columbia, or to serve as special tribunals 'to examine and determine various matters arising

* See 142 U. S. at 181.

between the government, and others, which from their nature do not require judicial determination and yet are susceptible of it.' But 'the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.' *Ex parte Bakelite Corp.*, 279 U. S. 438, 451, 73 L. ed. 789, 794, 49 S. Ct. 411. Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, *the public lands*, public health, the facilities of the post office, pensions and payments to veterans.

"The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined. But in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges."

And at page 57:

"In relation to the Federal government, we have already noted the inappositeness to the present inquiry of decisions with respect to determinations of fact, upon evidence and within the authority conferred, made by administrative agencies which have been *created to aid in the performance of governmental functions*, and where the mode of determination is within the control of the Congress, as e. g., *in the proceedings of the Land Office pursuant to provisions for the disposition of public lands*, of the

> authorities of the Post Office in relation to postal privileges of the Bureau of Internal Revenue with respect to taxes, and of the Labor Department as to the admission and deportation of aliens."

This portion of the decision, read in connection with the matter found at pages 58-59, constitutes a recognition of the well known distinction between utter want of jurisdiction and error in its exercise, which was so clearly expounded by Mr. Justice Field in the *Knight* case. It was with reference to cases where there is a complete want of jurisdiction that the language quoted at page 55 of Respondent's Brief was used in the *Crowell* case.

This case, as applied to the instant facts, actually means that if the right to make the Norway survey depended upon the status of the *locus in quo*, the departmental determination thereof made as a predicate for the exercise of its jurisdiction would be conclusive (see *Noble v. Union River etc. Co.*, 147 U. S. 165, 173; *Granhis v. Superior Court*, 146 Cal. 245, 255). Swelting Co. v. Kemp, 104 U.S. at 645.

Jurisdiction Over Subject Matter Is Conceded.

But it is not necessary to go that far. Though there is a *pro forma* denial (Resp. Br., p. 38) of the Department's right to make a survey without specific statutory authority therefor (as to which see O. B., pp. 71-73, 67-70), respondent has conceded that Mormon Island was at all times a parcel of public land and thereby it has conceded the existence of jurisdiction over the subject matter. That subject matter was the parcel of public domain and the delimitation of its boundaries. The means necessary to that end was a survey and such survey could only accomplish one result—the separation of upland from

tideland. This of course presented a question of fact for solution,—to what extent and along what line has the sea wrested such dominion as to render the underlying land uncultivable? The surveying or drawing of this line necessarily involved a question peculiarly one of fact and, if erroneously done, it amounted to error and nothing more. It is so decided in the *Knight* case and in the *Cragin* case.

Round and Round the Circle.

The heart of respondent's contention is found at page 54: "The question as to whether or not the Land Department had jurisdiction over the land involved in this action depends upon whether the land is or is not tideland. That question may be determined only from the evidence introduced at the trial of the action." Again we have respondent's favorite but vicious circle. Counsel's *Crowell* case answers the contention that this is a matter for court determination, as does also the *Russell* case; *supra*. Manifestly this contention is but a revamping of the ever recurring argument that there is no jurisdiction to survey any land *claimed* to have been tideland,—that the existence or non-existence of jurisdiction to determine the boundary must depend upon the correctness or incorrectness of the result, viewed in the light of subsequent recanvassing through other witnesses many years after the event and in no end of actions with varying complexions dictated by the changes in witnesses, testimony, jurors, judges and even advocates.

The point is definitely adjudicated against respondent by the *Knight*, *Cragin* and *San Francisco* cases, *supra*. Counsel's treatment of these decisions is characteristic of

the brief. There is a refusal to face the unpleasant feature of the *Knight* case dealing with this specific question, a disinclination to discuss the fact that the survey there considered was made subsequent to the confirmation proceeding and not subject in anywise to judicial review (O. B., pp. 61-63), followed by a flat assertion that the "only question" in the case was whether a Mexican grant included lands below high water mark; all of which is inconsistent with any genuine attempt at an analytical discussion of this controlling authority. The powerful concurring opinion of Mr. Justice Field is utterly ignored by counsel. The *Cragin* case is not individually discussed in the 117 pages of respondent's brief; it is merely mentioned in broadly characterizing groups of cases. *People v. San Francisco,* a state case virtually on all fours with the Knight decision and equally as damaging to respondent's position, is nowhere mentioned.

The claim (Resp. Br., p. 55) that, because the State of California owned tidelands by virtue of its sovereignty, "the land involved in this action 'was disposed of' so far as the United States Government was concerned" is another variation of the familiar circular contention that the validity of the Land Department determination is dependent upon its correctness.

The language of *Hardin v. Jordan,* 140 U. S. 401 (quoted at p. 56 of Resp. Br.), to the effect that it is a judicial question whether lands have been "previously disposed of," was not employed with reference to any such situation as the instant one and is not fairly applicable here. It refers to definite and identifiable tracts of land previously granted, withdrawn or otherwise removed from the category of public domain; the immediate context discloses this. The instant situation is covered by

the *Russell* case, where it is definitely established that the question of where the line should be located is not a judicial question (see O. B., p. 45).

Respondent's Argument Concerning Calls for Natural Boundaries.

Perhaps the most accurate criterion of the integrity of respondent's various contentions is furnished by the argument concerning calls for natural boundaries, which is found at Brief, pp. 61-67. The general rule is undoubtedly the one there stated. But its attempted application of this case fully discloses the extent of respondent's extremity. Norway was commissioned to survey Mormon Island by the process of locating its ordinary high water mark [R. 671]. The thing he was to survey was the tide line; so, according to respondent, he picks the water marking that tide line as the natural boundary, runs his lines around that boundary, and concludes his survey with exactly no result whatever, for all the courses and distances so carefully marked out by him fall. They yield to the control of his natural monument, the object of his survey! The island is its own monument; truly this is a *reductio ad absurdum*. As well might one say that a survey of a tract of forest land must yield to the outline described by the trees, as distinguished from any specific tree or trees therein. By this process of reasoning, Premier Mussolini's engineers, if they were sent to make a survey of the elephant trap into which the august King of Kings, Emperior Haile Selassi, recently precipitated his war tanks, would return with no report whatever, for the hole itself or the surrounding earth would be its own monument and, when they got through, all their measurements and directions would fall and they would have

been as well off had they stayed in camp and avoided the risk of more traps.

This court said in *Security Land & E. Co. v. Burns*, 193 U. S. 167, 179:

> "These general rules may be admitted. *The rule as to natural monuments is not, however, absolute and inexorable.* It is *founded upon the presumed intention of the parties,* to be gathered from the language contained in the grant, and upon the assumption that the description by monuments approaches accuracy within some reasonable distance, and places the monument somewhere near where it really exists. * * * In the case at bar, while there is a great difference in the amount of land so described, there are, at the same time, other facts which are material and which, in our opinion, when considered in connection with this difference, justify and demand a refusal to be controlled by the borders of the lake as a boundary."

And at page 187:

> "In such exceptional cases the supposed meander line will, if consistent with the other calls and distances indicated on the plat, mark the limits of the survey, and be held to be the boundary line of the land it delimits."

And in *White v. Luning*, 93 U. S. 514:

> "It is true, that, as a general rule, monuments, natural or artificial, referred to in a deed control, on its construction, rather than courses and distances; but *this rule is not inflexible. It yields whenever,* taking all the particulars of the deed together, *it would be absurd to apply it.*"

Is this not our situation? Must a rule, which was evolved in aid of definite boundaries, be pressed to the point where it subverts its own purpose? The California courts have answered this question in the negative. *Goss v. Golinsky*, 12 Cal. App. 71, 74:

> "Courses and distances control incidental calls for monuments, except where there is a clear intention shown to make such calls locative; and they also control indefinite and conflicting calls for monuments. They govern where surrounding circumstances show them to be more reliable, or where such is the intention of the parties, or where monuments are called for by conjecture and not by actually running out the lines upon the ground according to rule. The doctrine that monuments control courses and distances is *never followed where to do so would lead to an absurdity* or where they are inconsistent with the meaning of the deed."

The language of *Lillis v. Urrutia*, 9 Cal. App. 557, 560, is likewise pertinent:

> "These rules, obviously, are *conventional aids for the determination of the intention* of the parties to conveyances and to assist in locating the ground as actually surveyed. If otherwise that intention is made clear or the survey is conclusively delineated, even monuments called for may be disregarded, for the reason, as the code has it, that the construction is not doubtful and there are 'other sufficient circumstances to determine it'."

And particularly the following portion found at page 562:

> "In the determination of a boundary line a monument, of course, can be of no avail unless identified,

and *if destroyed its position must be accurately located.* If not identified or located definitely, it must give way to the 'certain definite and ascertained particulars', as provided in said section 2077 of the Code of Civil Procedure."

Higinbotham v. Stoddard, 72 N. Y. 94, 98:

"We think this construction cannot be upheld, for the rule stated is not inflexible, and has some exceptions. It applies with less force to monuments which are artificial than to natural and permanent objects, and *when there is anything in the decription which shows that the courses and distances are right in themselves, they will prevail, because the primary object in all cases is to carry out the intention of the parties;* as, when it is apparent from the face of the deed that the *intention was to convey a specific quantity of land,* if the courses and distances given would include such quantity, and the description by monuments embrace more or less, the former should be followed. (Baldwin v. Brown, 16 N. Y. 359; see, also, Townsend v. Hayt, 51 *id.* 656.)"

In *M'Nichol v. Flynn,* 167 N. Y. App. Div. 646, 153 N. Y. Supp. 308, 310, the court, after quoting the foregoing language of the *Higinbotham* case, said:

"It is also the rule that *if monuments once existing are gone,* and the places where they originally stood cannot be ascertained and located with precision, *the courses and distances, when explicit, must govern.* Drew v. Swift, 46 N. Y. 204, 209."

Indeed, respondent's argument brings itself within the scope of *Payne v. English,* 79 Cal. 540, 546, where it is said:

"It is argued, however, by respondents that in cases of disputed boundaries, courses and distances and quantities must give way to monuments. That is, undoubtedly the general rule. But before the rule can be applied, *there must not only be monuments which will stand still, and not float or fly, but the place where the alleged monuments were at the time the conveyance was made must be satisfactorily located.*"

None of these elements is possessed by respondent's so-called monument. The following cases are also peculiarly pertinent:

Guitar v. St. Clair, 238 Mo. 617;

Dolphin v. Klann, 246 Mo. 477;

Jones v. Andrews, 72 Tex. 5;

Koch v. Gordon, 133 S. W. 609 (Mo.);

Buffalo etc. R. Co. v. Stigler, 61 N. Y. 348, 351;

Doe ex dem. Miller v. Cullum, 4 Ala. 576;

Brolaskey v. McClain, 61 Pa. 146, 164;

King v. Watkins, 98 Fed. 913, 923-25;

Duncan v. Eagle Rock etc. Co., 111 Pac. 588, 592, 593 (Colo.);

Thaldman v. Thomas, 102 Fed. 935, 936;

Hostetter v. Los Angeles etc. Co., 108 Cal. 38, 44.

Cases such as *Curtis v. Upton,* 175 Cal. 322, *Adair v. White,* 85 Cal. 313, and *More v. Massini,* 37 Cal. 432, are not in point. They treat of surveys in which the body of water constitutes but one of the boundaries, and hence can be properly treated as a natural monument. They

have no tendency to support the conclusion that a body of water surrounding an island can be its own monument or the monument of the island so surrounded and to be surveyed.

Respondent's Contentions Concerning Meanders as Boundaries.

Respondent Abandons Trial Theory.

The outstanding feature of the brief is the deliberate shift of position made by respondent concerning the question of whether the *locus in quo* was included within the confines of the Government patent. Pages 7-28, 57-70 are devoted to the contention that it was not, and that assertion expressly or impliedly permeates most of respondent's other arguments. But the cold record is this: the complaint was drawn upon the theory that the patent included the disputed area (see O. B., p. 11). The cause was tried by plaintiff under a definite commitment to this position. We quote the record:

> "Mr. Ashburn: I would like to ask counsel a question to clarify this a little. Do you contend that there was a change between 1880 and the time either of the Norway survey in 1899 or the time Mr. Hughes went over the ground at the periods he mentioned?
>
> Mr. Butts: No, only imperceptible amounts; not any material change.
>
> Mr. Ashburn: That is the way I construe his pleading; *not that he makes the contention that there was a change in the line, but that he contends that the line in 1880 was not where Norway said it was.*
>
> Mr. Butts: *That is right.*" [R. 322.]

"Mr. Butts: No material change, I said. There is, naturally, some little imperceptible change.

The Court: Yes. We are concerned, therefore, as I understand your case, *with the condition of the island at the time of the patent or, at least, the Norway survey.*

Mr. Butts: We are concerned with its condition *at that time and prior to that time,* and we are also concerned with the condition of the island as it existed at the time man came in and changed it from its natural state." [R. 323.]

"The Court: *As I understand you, you definitely agreed that there was no material change after the Norway survey.*

* * * * * * * * *

Mr. Butts: That is substantially correct, *that is our theory.*" [R. 324.]

"The Court: In other words, the government properly issued a patent to the portion of the land colored white?

Mr. Butts: Yes, Your Honor.

The Court: But did not properly issue a patent to what you call the buff colored portion?

Mr. Butts: Yes, in so far as the patent attempted to grant away and grant to the patentee the tide lands which at that time we contend belonged to the State of California, that it is void in so far as it attempted to do that. In other words, that the government could not convey away something which it had not title to and which had already been conveyed to the State of California.

The Court: Yes, I am clear upon that. I did not know for a while but this involved merely the border; in a sense that is true, but not in the way that I had conceived.

Mr. Butts: That is true, Your Honor. It is our contention that there was only a small portion of that land which was described in the patent that was upland, that was above the line of mean high tide, a very small area, and that the rest of it was tide land." [R. 210-211.]

"Mr. Butts: That is what we contend; that this Norway survey, and the patent issued following it, *does not correctly delineate the shore line* of the bay, or the island, or the mean high tide, and that there was no intention on the part of the government, in fact, the government could not convey that land which at that time belonged to the state of California." [R. 213.]

And, after some further discussion, the court said, at R. 216-17:

"I take it that this is clearly an attack upon the original survey.

* * * * * * * * *

"I think that clearly it is not a question of sinuousities or immaterial variance, or representing a crooked line, for convenience, by a straight line. That is not the question. The question is directly attacking the survey and the patent."

And at R. 321:

"Mr. Butts: We expect to show a little later on, if Your Honor please, that the *Norway survey was absolutely incorrect.* Instead of it being at ordinary high water mark, it was down to mean low water, and *no part or portion of that survey ever reached*—"

as a result of all of which, the court found:

"That the said patent conveyed to the said William Banning the whole of said Mormon Island, as

surveyed by said W. H. Norway and in accordance with the above mentioned plat or map; that the boundaries of the said Lot One, as so conveyed, were the boundaries as shown on the said plat or map and as described in the said field notes of the said survey; that included within the said Lot One as so conveyed by the said patent are all of the lands described in the plaintiff's bill of complaint herein and claimed by it to be tideland or submerged land." [R. 170.]

And the appeal was presented to the Circuit Court upon the same basis (see p. 10 of O. B. herein). The making of those admissions is conceded at the bottom of page 8 of Respondent's Brief.

Respondent's counsel would now have *defendants'* position construed as an advocacy of a fixed and permanent boundary line, such as claimed in *U. S. v. Boynton,* 53 Fed. (2d) 297. No such contention was ever made; the point was expressly reserved by defendants [see R. 324]; that is to say, our contention is and always has been that the survey and patent established a fixed and definite boundary which would be permanent *except* as altered from time to time by the processes of accretion and reliction. But so far as the sufficiency of plaintiff's case is concerned, any potential issue on this matter was removed by voluntary abandonment. Plaintiff's proof was thus confined to the issue of the location of the line at the time of the Norway survey. The reason is obvious. The only evidence substantially contemporaneous with the Norway survey was the Smith Map (Exhibit 7) which definitely refutes respondent's contentions (see O. B., pp. 137-138). Even now counsel concede that "Mormon Island is shown on this map as being a long narrow strip of land and as being *'1 foot*

above high water" (Resp. Br., p. 96). Aside from this, the evidence closest in point of time was 1859 (Exhibit 20) in the one direction and 1899 (Exhibit 4) in the other direction. If plaintiff had conceded the occurrence of changes in the boundary, its cause was lost, for it was lacking any evidence of the nature, extent or exact location thereof.

Of course the tide line gradually shifts, as contended at p. 38, Resp. Br., and titles move with it when the changes are gradual and imperceptible, but there was no such issue tried by the plaintiff. The quest was for the original patent line and no other.

Question Treated as One of Fact.

It is not *now* contended that the question of whether a meander line constitutes a definite boundary is one of law (see Resp. Br., pp. 20, 26), and the matter is discussed by counsel as an issue of fact. This is fatal to their contention, for respondent still stands in the position of an appellant seeking to overthrow a finding of fact. It is always confronted with its admissions of record. The answer avers:

> "that the said Patent conveyed to the said William Banning the whole of the said Mormon Island, as surveyed by the said W. H. Norway, and in accordance with the above mentioned plat or map; that the boundaries of the said Lot One, as so conveyed, were the boundaries as shown on the said plat or map and as described in the said field notes of the said Norway; that included within the said Lot One, as so conveyed by the said Patent, are all of the lands described, or attempted to be described, in the plaintiff's Bill of Complaint herein." [R. 48.]

And the only reply thereto is this:

> "Plaintiff denies that said patent conveyed to said William Banning the whole of the land surveyed by said Norway and denies that said patent conveyed any part of said lan. described in paragraph XII of the complaint, the same being tide land lying below the line of ordinary high tide surrounding said island as said line of ordinary or mean high tide existed in its natural state." [R. 113.]

Certainly no issue is thereby raised; and any finding contrary to the averment of the answer would necessarily be ignored because outside the issues.

The inescapable admissions of the complaint (quoted in O. B., p. 11), fortified by the oral admissions in the trial court and the admissions of the brief in the Circuit Court (quoted at O. B., p. 10), preclude respondent from now abandoning its theory of the case and seizing upon one which at this late date seems more opportune (*Thomas v. Taylor*, 224 U. S. 73, 83-84; *New York etc. R. Co. v. Estill*, 147 U. S. 591, 614). We have already quoted the court's finding [R. 170].

The authority of the cases cited at pages 133-135, Opening Brief, has not been challenged, merely ignored, and the conclusion seems inevitable that respondent, if in position to reopen the question, could not now prevail on this matter through a mere collation of certain isolated items of evidence which, at best, tend to overthrow the court's finding and conflict with the other proof upon which the finding was predicated.

Respondent's Claim of a Right to Reject Meander Corners.

Counsel present no case in support of this claim except *United States v. Boynton*, 53 Fed. (2d) 297, which is discussed in O. B., pp. 94-95. The case does not actually support the contention. It is only the implications of the language of the opinion which have that tendency. The point was not decided. The actual holding was this: that under the circumstances there presented, the meander lines were intended to indicate the shoreline as the boundary and that such boundary would shift with the natural and gradual changes of the tide line. The lower court had held that the meander lines of the survey "were fixed and definite" and "that the boundaries of Lot 1 along the shore lines could not be varied or changed thereafter by the action of the sea or tides" (p. 298). The language of the decision upon which respondent leans was used in a discussion of the propriety of this finding, but the holding was that "the high tide line as now located, in our opinion, defines the limits of the property owned by appellees". *It does not appear that there was any occasion or necessity in that case for the rejection of any meander corner.*

The recognition of the doctrine of accretion and reliction lends no support to the claim of a right to reject corners of an original survey. It may be that the gradual process of reliction will devour one or more corners and, of course, under those circumstances the line would move back of the original point so established. But that is a radically different proposition from the assertion that the meander corner initially establishes nothing and that the line can be carried back as of the date of survey to a

location which, in the course of nature, would be accomplished only after long years of gradual erosion,—which is essentially the position for which respondent contends. To illustrate: A parcel of land, owned by John Doe, is situated near but not upon the bank of a stream, such as the Mississippi River, and has a fixed and permanent boundary consisting of a straight line. Doe's neighbor, seemingly more foresighted than he, has an intervening parcel of a few acres which immediately abuts upon the river and thus intervenes between Doe and the stream. But the Mississippi, as is its custom, gradually changes its course until the intervening parcel has been entirely eaten away and that of Doe has been encroached upon. His straight boundary line now disappears. There is less land left to him and the irregular bank of the river constitutes his new boundary. This is the result of the doctrine of reliction. It is applicable to the Lot 1 discussed in the *Boynton* case, *supra,* to Mormon Island, or to our supposititious parcel; but it has no bearing whatever upon the question of where the line of the original survey was located or whether it was at that time and until the occurrence of gradual changes a definite boundary. Petitioners herein insist that the Norway survey defined a definite boundary, not that it created a permanent one impervious to the effect of time and tide. Therein our situation differs materially from the upland owners whose rights were involved in the *Boynton* case. The City, on the one hand, committed itself in the trial court to the doctrine of permanence of the 1880 boundary and essayed to show that it was incorrect *in toto,* corners and all,—not that it had disappeared through the gradual process of nature.

Meander Rule Enlarges Titles—Not Restrictive.

Counsel for respondent overlook another important consideration. Their cases, as plainly appears from pages 14-19 of their brief, show the doctrine of meanders to be one of enlargement of titles. In each instance cited the thought expressed is that of *Hardin v. Jordan*, namely, that the lines are established "not for the purpose of *limiting* the title of the grantee to such meander lines". Counsel say, at page 19, that this doctrine of enlargement "should likewise be applied where it results in excluding land which is enclosed within the meander lines of the government survey", but they cite no authorities in support of the proposition and thus place themselves in the same situation as counsel for petitioners and the Supreme Court of Michigan, which said, in the case of *Brown v. Parker*, 127 Mich. at 392:

> "We recall no case, however, that holds in express terms that title does not extend to meander lines".

See, also, *Wilson & Co. v. United States*, 245 U. S. 24, 29, quoted at p. 91, Opening Brief.

The San Pedro Railroad case, 182 Cal. 652.

Counsel, in discussing this case (Resp. Br., p. 16), say: "The petitioners argue that the *San Pedro R. R.* case is not in point for the reason that there was no attempt in that case to disturb or reject any of the meander corners of the survey." And by silence they admit the truth of our assertion.

Erroneously they assert on the same page that "It was contended in that case that the survey and the patent which had been issued were conclusive evidence of the boundary

line." The decision does not bear this out, nor does the record in that case. At page 654 of the report, the court said:

> "The *sole question*, then, for determination by this court is whether or not the lines of the patent defining the inner bay exception are meander lines of the inner bay within the meaning of the rule which makes the shore line of that bay the actual boundary line where the intent is to meander such shore."

The City's brief in that case contained these significant statements:

At page 17:

> *"We do not seek in any way to attack the patent or go behind it,* but have claimed in the lower court and claim here, that *the description contained in the patent of the excluded portion includes the lands which are in controversy here."*

At page 49:

> "There never has been any dispute in this case whatever * * * that the courses and distances if retraced with exactness by any surveyor would show * * * included within the exterior limits of the grant and excluded from the Inner Bay Exception the particular tidelands to which the City in its grant is now asserting title.
>
> "In other words, except for the fact that the City is claiming that the true line is the line of ordinary high tide there would be no dispute whatever between the city and appellants; as there is not and never has been any dispute as to the location on the ground of the surveyed line run by courses and distances of the Inner Bay Exception Line."

Attention is again invited to the discussion of this case at pages 95-96 of our Opening Brief.

Respondent's Contention That Mean High Tide Line Has Been Adopted in California as Boundary of Upland.

Respondent's Cases Reflect Dicta Not Decision.

Chief reliance in this connection is placed upon *Los Angeles v. San Pedro etc. R. Co.*, 182 Cal. 652, it being stated, at Br., p. 71, that the question involved was "whether the inner bay exception line * * * constituted the boundary line between tideland and upland, or whether the line of mean high tide of the Pacific Ocean was the actual boundary line." This is not in keeping with the decision. We have already quoted its statement as to the sole question presented by the appeal and there was no reference therein to "mean high tide line". Nor is respondent's position sound when it urges that the question was *decided* whether mean high tide line is the boundary, while its elevation was merely assumed. Judge Wilbur, who wrote that opinion, said at bar:

> "It has been assumed by the appellant that the mean high tide line is that boundary line, and that this line is 5.1 feet above the mean low tide line in the Bay of San Pedro whose waters surround Mormon Island. This was the boundary line fixed by the courts of California in the case of Los Angeles v. San Pedro, supra, involving tide lands in the Inner Harbor at San Pedro. It is true, however, as appellees state, that this line 5.1 feet above mean low tide was agreed upon by the parties and upon that basis assumed by the court to be the boundary line between the tide lands and the upland." [R. 724.]

This language will not bear the construction placed upon it by counsel for respondent.

The opinion in 182 Cal. 652, and the printed record therein show that high water mark and mean high tide were (mistakenly) considered throughout by counsel and the trial and appellate courts to be interchangeable terms. No distinction having been drawn nor issue raised thereon, there necessarily was no decision that as a matter of law the terms were equivalents. They were merely assumed to be such,—and this through mistake (or perhaps design of counsel) in disregarding the *Teschemacher* definition of high water mark.

An examination of the record in the *San Pedro* case discloses that there was no distinction drawn by the parties between "mean high tide" and the "ordinary high water mark" defined in the *Teschemacher* and other similar cases. The trial court found, *as a matter of fact,* that the elevation of the high tide line was 5.1 feet [see, for example, paragraph XIII of the Findings at Tr. p. 38 and paragraph I at Tr. p. 107], and spoke of it as "the line of high tide" [Tr. fol. 102] and "the line of ordinary high water." [Tr. fol. 308.] The pleadings raised no issue on this matter, nor did the briefs of appellant or respondent challenge the findings in this respect.

The issue being whether the inner bay exception line or the ordinary high water mark constituted the boundary of the lands in question, and counsel having virtually agreed that ordinary high water mark is the equivalent of mean high tide line and that its elevation is 5.1 feet, there was nothing for the Supreme Court to do except to decide the case upon this factual basis. And there was, as appears from the face of the opinion, no attempt to decide the matter as one of law. The issue presented and decided was one of those judicial questions mentioned in the

Maxwell case, supra, namely, whether the land was inside or outside the established boundary line, not whether the line, as established, was correct.

City of Los Angeles v. Duncan, 130 Cal. App. 11, falls in exactly the same category. The point was assumed, not decided. This appears from the introductory paragraph (page 12), where it is said:

> "Respondents' disclaimer of any title to tidelands narrowed the dispute to the location on the ground of the line of mean high tide, which, *concededly,* fixed the boundary between the city's tidelands and respondents' property."

The language quoted by respondent was predicated upon this agreement and assumption.

Nor was the point *decided* in *Miller & Lux, Inc. v. Secara,* 193 Cal. 755. An attack was there made upon the validity of an Irrigation District upon the ground that the description of the District in the organization proceeding was void for uncertainty, and this claim rested upon alleged inability to locate the right bank of the Fresno River. The court found and held that the official maps to which reference was made in the description sufficiently located or furnished the means of locating the river bank. It then indulged, by way of *dictum,* in certain remarks concerning the proper way of making the said location; this was wholly unnecessary to the decision and was predicated upon a misapprehension of the *San Pedro* case. The fact is emphasized by the case of *Oakland v. E. K. Wood Lbr. Co.,* 211 Cal. 16, wherein the *San Pedro* case was cited at page 22, and the court on page 23 adopted as the boundary the line of the "neap or ordinary tides" rather than the mean high tide.

What Are Neap Tides?

Counsel attempt to explain away the long line of California decisions holding the neap line to be the boundary, and in this behalf claim that the neap tides there referred to are different neap tides from those defined by the Coast & Geodetic Survey in its Special Publication No. 135. But counsel's discussion discloses that the point was directly involved and definitely decided in the cases cited at page 104 of our Opening Brief. They unquestionably hold that the line of the neaps is the boundary. That being the case, it is immaterial whether Judge Field's neap is the same as that of the Coast & Geodetic Survey; *no effort was made to locate the neap line, under any definition, upon Mormon Island* and hence the plaintiff's case fails. It becomes wholly academic whether plaintiff could have made such a case; obviously it did not try although its attention was repeatedly directed to the point. If counsel's argument means (as seems the case,—see pp. 81, 84) that the word "neap" means "ordinary" and that "ordinary" means the average of all the highs, not confined to the neaps, it is directly in the teeth of the authorities. It finds no support anywhere.

But consideration of the matter demonstrates that Judge Field had in mind the same sort of neaps which are defined in Publication No. 135. As a basis for correct construction of his language, the quotation should read as follows:

> "* * * and the jury evidently fixed it at the limit which the monthly Spring tides reach—tides which occur only *at* the full and change of the moon. * * * But it is not the limit to which we refer when we speak of 'usual' or 'ordinary' high water

mark. By that designation we mean the limit reached by the neap tides; that is, those tides which happen *between* the full and change of the moon, twice in every twenty-four hours." (18 Cal. at 21.)

Judge Field undoubtedly did use the phrase "change of the moon" as referring to the new moon [see R. 727]. His definition of the spring tides shows that he considered them as occurring at full moon and new moon; this being the case, his reference to neap tides as those which happen "between the full and change of the moon" necessarily means (unless we attribute to him a total ignorance of the subject) the tides occurring during the first and last quarters.

Averaging of Neaps.

We concede that our authorities do not call for the "mean" of the neaps; nor have we contended that they do. We merely said, at p. 15, Opening Brief, that "any judicial approach toward acceptance of such theoretical boundary has resulted in the adoption of the line of the neap tides, not the mean of high tides." But if respondent's authorities, cited at page 77, mean anything in California, it is that the neaps must be averaged, not the highs.

Rationale of Neap Rule.

The reason for adoption of the line of the neaps as the boundary is unmistakable; historically and actually it rests upon a law of nature. The neaps alone furnish "such continuity of the flow of tide-water over them (lands), or such regularity of the flow within every twenty-four

hours, as to render them unfit for cultivation, the growth of grasses or other uses to which upland is applied." (See O. B., p. 101.) By this we mean to say that the adoption of the neap tides as the criterion does confine the tideland to that ground which is covered and uncovered every day by the tides with the result that it is wrested from vegetation and thus drawn within the dominion of the sea. To choose a higher line, such as the mean of all the high tides, draws into tideland category certain areas which do not have any "regularity of flow within every twenty-four hours" or (as phrased in *State v. Pickney,* Resp. Br., p. 79), "daily high tide as distinct from the high spring tides or ordinary spring tides." It is the land covered by the high tides larger than the neaps which create swamp and overflowed lands, always recognized as belonging to the upland (see *People v. Morrill,* 26 Cal. 336, 354-6; *Irwin v. San Francisco Savings Union,* 28 Fed. 708, 712; *Miller v. Tobin,* 18 Fed. 609, 614).

If averaging of tides is of the essence, the neaps are susceptible of this simple computation equally as well as all of the highs.

Statute of 1911 Not a Rejection of Neap Rule.

The tideland grant of 1911 can have no bearing upon the instant question. The legislative function is to define rules for the future, not to pass upon existing rights,—that is a judicial question; the opinion of the Legislature concerning that is but an opinion and the courts cannot abrogate their functions in favor of the lawmaker.

But the case of *Strand Improvement Co. v. Long Beach,* 173 Cal. 765, concludes the matter. It holds, in effect,

that the 1911 tideland grant was not intended as a definition of existing boundary lines and that the phrase "mean high tide line" was there used to create a new boundary and to withhold from the grantee any filled tidelands situated above the line of the mean high tide on the date of the grant. The case is not mentioned by respondent in this connection, though quoted at Opening Brief, p. 116.

Respondent's Contention That the Elevation of Mean High Tide Is 5.1 Feet.

Leypoldt's Seiche Argument.

The argument rests upon the predicate that the United States Coast & Geodetic Survey erroneously excluded from its computations the effect of the local seiche. This turns entirely upon the testimony of Mr. Leypoldt. He contended that Los Angeles Harbor or its immediate vicinity had a peculiar oscillation of its own commonly known as seiche, which, as shown upon a tidal graph, is represented by the sawteeth of the larger curve. He asserted [at R. 403] that "the line that is drawn through these sawteeth or seiche is the kind of curve that the Coast & Geodetic draws and uses, and the witness claims that the curve should be drawn along the *tops* of these sawteeth where the seiche is continuous as in Los Angeles". Under cross-examination the witness was unable to sustain his position. Referring to the Coast & Geodetic instruction to take a mean of the tides as shown by the readings, the witness said at R. 408:

> "that by taking a mean with respect to the seiche, *you average out what is above the mean line and what is below the mean line, and cancel the one by the other.* It is the smooth line that averages out the

irregularities above and below it. * * * The *line that represents the mean of the seiches is the one that the Coast & Geodetic uses* as the basis of its computation from which it derived its 4.7 for mean high water and the witness' 5.1 was derived from his computation which reads *to the tops on high water and the bottoms on low water* and that he calls mean high tide and the elevation 5.1."

The court aptly summarized the effect of the witness' testimony as follows:

"The Court: It is generally to this effect: Does anybody else hold the same view that you do, meaning by 'you' the City of Los Angeles, with respect to the inaccuracy of the method pursued by the Coast & Geodetic? Is that about it?

Mr. Ashburn: Yes.

A. This is such a rare phenomenon it is just a special case, and they don't include it.

The Court: To your knowledge do you know of anybody—

A. No, sir." [R. 405.]

Effect of Hydrographic Changes.

Reference to the Harbor line map and the statements of the United States engineers that "the average rise of the tide above the plane of reference is 5.1 feet" is equally unfortunate. They are manifestly based upon the inapplicable datum plane of 1875 (see O. B., p. 132). Our discussion of the effect of hydrographic changes made subsequent to the establishing of that datum plane (found at pp. 119-132) has not been challenged by respondent's counsel. This doubtless means unwilling assent thereto. We are fortified in this inference by the language of

Judge Wilbur, who said at R. 732: "The rule with regard to these matters is too well settled to require a statement thereof in this opinion." His lack of challenge of our arguments or assertion of a contrary conclusion shows that this language means that our position was undoubtedly conceded to be correct.

Counsel misapprehend our attack upon the complaint (Resp. Br., p. 86). The point that we make (O. B., p. 98) is that the description of the complaint is irrevocably tied into an alleged 5.1 foot contour [see R. 11], not the neap line which, according to plaintiff's theory, would be 4.3 and, according to the authoritative determination of the Coast & Geodetic, would be 3.9.

Respondent's Position Concerning the Granting of a New Trial Without Examination of Sufficiency of Plaintiff's Proofs.

Effect of Petitioners' Cases Conceded.

The main propositions urged by us in this connection (O. B., pp. 110-111) are conceded by respondent's silence. Counsel assert, contrary to the Circuit Court's plain indication [R. 723-724], that the Circuit Court did order a new trial on the strength of plaintiff's evidence (Resp. Br., p. 88). In effect, it is contended that the Circuit Court overthrew the finding of the trial judge upon this question of fact (Resp. Br., p. 88). Neither of these assertions or contentions finds any support in the record. Elaboration would add nothing to the strength of this bald fact.

Attempted Justification of Circuit Court Ruling.

The contention is made, at page 92, that the Circuit Court reversed the case because it concluded that the trial judge had disregarded undisputed and uncontradicted evidence. Counsel thus seek to uphold the Circuit Court's ruling upon a ground which surely condemns it, namely, that it disregarded the formal findings of the trial judge in favor of expressions of opinion at the trial, which opinions manifestly weakened at the time of preparation of the written opinion and finally resulted in a definite ruling to the contrary, as evidenced by the findings and conclusions (see discussion of this matter at O. B., pp. 133-135).

Respondent's Claim That the Disputed Area Is Tideland in Fact.

Effect of Trial Judge's Finding.

Faced by the trial court's finding to the contrary, respondent, as the losing party in the trial court, is still in position of an appellant complaining of an erroneous finding of fact. Indeed, counsel, at page 103, come to rest upon the proposition that "the finding of the trial court that the land is not tideland was and is clearly erroneous".

A major and persistent vice infects respondent's arguments under this caption. The fact that defendant produced no oral evidence is conceived by counsel to spell out a case of uncontradicted evidence of tideland status. They ignore the fact that defendant rested upon the weakness of their case; they forget that there were no two maps which showed the same or substantially the same line as boundaries of the upland; they are unmindful of the value of successful cross-examination and the effect of

conflicting inferences arising from a single witness' testimony; they ignore the effect of the damaging admissions of their license agreement and of their compromise concerning tideland location No. 152 (see O. B., pp. 192-193). It is impossible to read *and weigh* the treatment contained at pages 136-192 of our Opening Brief without reaching the conclusion that the transcript is shot through with contradictory evidence; that on every factual issue there is testimony or documentary evidence produced by the plaintiff which sustains the court's finding and which is sufficient to prevent its being overthrown upon appeal.

We again invite attention to the matter found at pages 189-192 of our Opening Brief under the caption "Cumulative Effect of Respondent's Evidence". It is there demonstrated that plaintiff's expert witnesses disagreed with each other on crucial matters and that finally the trial attorney adopted a position which each of his experts had repudiated. Not only is there contradiction throughout plaintiff's case, but there is that degree of uncertainty which makes it fall of its own weight.

Further pertinent observations concerning this portion of respondent's brief must be withheld because of the limited time available for the preparation of this brief.

Respondent's Contentions Concerning Estoppel.

The claim, at page 109, that "All the allegations in petitioners' answer upon which petitioners' plea of estoppel is based are denied by respondent" is at least disingenuous. No attempt is made to review the pleadings or to point to any respect in which our analysis thereof at pages 18-21, 199 is inaccurate.

Respondent's Claims Concerning the Dismissal of the Former Tideland Action.

The same lack of frankness pervades this discussion as in the case of estoppel. At page 116, it is asserted that "All of the allegations of petitioners' answer upon which petitioners rely in support of their contention that the dismissal of the case of *People v. Banning* constitutes a retraxit, are denied". Exactly the same observations apply to this matter as to the contention concerning estoppel.

The assertion that the dismissal was made without prejudice (Br., p. 116) is not supported by the record; the stipulation of counsel attempted to make it so and that is the matter to which counsel's record references refer. But such attempt was necessarily nugatory for the reasons mentioned at pages 204-206 of our Opening Brief.

So far as permitted by time limits, we have covered new matters raised in respondent's brief. We believe that all other arguments were fully anticipated in our Opening Brief, and we therefore forbear further elaboration of same.

Respectfully submitted,

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